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# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

**PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066**

**EXCISE APPEAL BRANCH**

Date **05/03/2012**

Appeal No. E/2478/2005 - EX[DB]

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
LARSEN & TOUBRO LTD. (ECC DIVISION)
PLOT NO. 158-B, SECTOR-III, PITHAMPUR, DISTT.
DHAR, M.P.

**LARSEN & TOUBRO LTD. (ECC DIVISION)** Appellant

Vs

**C.C.E. INDORE** Respondent

I am directed to transmit herewith a certified copy of **Final order No. A/244/ 2012 EX[DB]** dated 02-3-12 passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**

Assistant Registrar
(Excise Appeal Branch)

**Copy to :**

1. Respondent
**C.C.E. INDORE**
MANIK BAGH PALACE, POST
BOX NO. 10, INDORE 452001 (M.P.)

2. Adv. / Consult
**MR.P.K.SAHU**
D-247,SECOND FLOOR,DEFENCE COLONY, N DELHI

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd.,1512-B, Bhishm Pitamah marg,Opp. ICICI Bank of Defence Colony, New Delhi-3
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file

Assistant Registrar
(Excise Appeal Branch)

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL**
**West Block No. 2, R.K. Puram, New Delhi – 110 066.**

**Date of Hearing : 15.11.2011**
**Date of Pronouncement :** 02/03/12

**Excise Appeal No. 2478 of 2005**

[Arising out of the Order-in-Original No. 36/COMMR/CEX/IND/2005 dated 25.4.2005 passed by the Commissioner of Customs & Central Excise, Indore]

**Coram:**

**Hon'ble Ms. Archana Wadhwa, Member (Judicial)**
**Hon'ble Shri Mathew John, Member (Technical)**

| | | |
|---|---|---|
| 1. | Whether Press Reporter may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? | Yes |
| 2. | Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? | Yes |
| 3. | Whether their Whether their Lordships wish to see the fair copy of the order? | Seen |
| 4. | Whether order is to be circulated to the Department Authorities? | Yes |

Larsen & Toubro Ltd. Appellants

Vs.

CCE, Indore Respondent

**Appearance:**

Appeared for Appellant : Shri P.K. Sahu & Shri Prashant Shukla, Advocates

Appeared for Respondent : Shri S.R. Meena, A.R.

CORAM: Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

FINAL Order No. A/244/2012-EX(BR) dated............

Per **Mathew John :**

The Appellants manufactured transmission towers for electricity and supplied it to Sasaram HVDC transmission system, a project executed by M/s Power Grid Corporation of India Ltd. ("PGCIL" for short). PGCIL certified that the project was covered under PSDP-II loan of World Bank. The Appellants cleared the goods from 23rd September 1999 to March 2001 and claimed exemption under Notification No. 108/95-CE dated 28.8.95. The said exemption was available for projects financed by World Bank. However, the project was financed by World Bank only with effect from 1.3.2000. Therefore an issue arose whether the said exemption could be extended to goods cleared prior to that date. Since there was doubt on this issue the Appellants remitted an amount of Rs.1,21,19,858/- and claimed that they were eligible for Cenvat credit on customs duty paid on inputs used to the extent of Rs.1,13,28,587/-. Revenue issued a Show Cause Notice demanding duty of Rs.2,34,48,545/- with a proposal to adjust the amount of Rs.1,21,19,858/-, already paid by them. The notice is adjudicated confirming the duty demanded along with interest and penalty.

2. In the impugned order it is stated that it is an undisputed fact that duty was payable on clearances prior to 1.3.2000. However, it is seen from the submissions recorded in the impugned order that the

Appellants have been disputing this liability, in fact they had asked for refund of duty already paid.

3. On merits, the submission of the Appellants is that the project was financed by World Bank and the contracts executed by PGCIL also specifically provided that the project enjoys benefit under Notification No. 108/95 dated 28.8.95. Necessary certificate for availing the exemption as prescribed under the notification was produced by Appellants. Further, they contest that there is no condition in the said notification that the entire project cost should have been financed by the World Bank. They argue that in fact no financing agency provides loan for the entire cost of a project and part of the cost of a project has to be met by the beneficiary of the loan. In this case all the cost incurred prior to 1.3.2000 should be considered as finance put in by the beneficiary of the loan and the fact that loan was available only for expenditure after 1.3.2000 does not disqualify the project to be a project financed by World Bank. Therefore there is no reason to deny the benefit of Notification No. 108/95-CE.

4. The Appellants rely on the decision of the Tribunal in the case of **Nestor Pharmaceuticals Ltd. Vs. CCE** - 2000 (116) ELT 477 (T) to support their argument that the benefit of Notification No. 108/95-CE cannot be denied for the reasons that the entire cost was not borne by the international organisation.

5. The Appellants also submit that there was no suppression of fact on their part. The project authority had issued certificate required Notification No 108/95-CE and the Appellants had availed exemption based on such certificate and therefore no suppression can be alleged based on the fact the World Bank financed expenditure from 1.3.2000 only. Therefore they contend that the entire demand is barred by limitation.

6. It is the further submission of the Appellants that if they have to pay duty they should be given set off for countervailing duty paid by PGCIL amounting to Rs.1,13,28,587/- on raw materials imported by PGCIL and used by the Appellants in the manufacture of excisable goods.

7 The ld. A.R. for Revenue submits that the project qualified for exemption under Notification No. 108/95-CE dated 28.8.95 only from 1.3.2000 because only from that date the World Bank financed the project and therefore all the clearances made prior to that date has to pay duty. Ld. AR points out that this position was accepted by PGCIL when they paid Customs duty on the imported raw material. PGCIL also pointed out to the Appellants about the liability prior to 1.3.2000 and the Appellants paid excise duty as soon as the issue was raised with them. It is the contention of the A.R. that the Bills of Entry under which the inputs were imported by PGCIL showed payment of nil rate of Customs duty and therefore straight set off of duty paid by PGCIL on the raw materials cannot be allowed and that has to be done in a separate proceedings as is ordered in the impugned order in original.

8. We have considered arguments on both the sides.

9. We are not able to see any mis-representation on the part of the Appellants with intent to evade payment of duty. We note that the conditions for claiming the said exemption were as under :

> "Provided that before clearance of the said goods, the manufacturer produces before the Assistant

Commissioner of Central Excise having jurisdiction over his factory :-

(a) ................

(b) in the case the said goods are-

(i) ..................

(ii) Supplied to a project that has been approved by the Government of India and financed (whether by a loan or a grant) by an international organisation listed in the said Annexure, a certificate from an officer not below the rank of Deputy Secretary to the Government of India, in the Ministry of Finance (Department of Economic Affairs) that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India .

(c ) In case the said goods are intended to be supplied to a project financed (whether by a loan or a grant) by the World Bank, the Asian Development Bank or any international organisation other than those listed in the Annexure, and

(i) if the said project has been approved by the Government of India, a certificate from the executive head of the Project Implementing Authority and countersigned by an officer not below the rank of a Joint Secretary to the Government of India, in the concerned Line Ministry in the Government of India, that the said goods are required for the execution of the said project and that the said project has duly been approved by the Government of India, and

(ii) if the said project has been approved by the Government of India for implementation by the Government of a State or a Union Territory, a certificate from the executive head of the Project Implementing Authority and countersigned by the Principal Secretary or the Secretary (Finance), as the case may be, in the concerned State Government or the Union Territory, that the said goods are required for the execution of the said project, and that the said project has duly been approved by the

> Government of India for implementation by
> the concerned State Government."

Revenue is not contesting the facts that necessary certificates to claim the exemption were produced by the Appellants at the time of clearance of the goods. There is no case made out that such certificates were fraudulent or not issued by proper authority.

10. We are also not in agreement with the argument of the Appellants that the claim for Cenvat credit should be decided in a separate proceeding for the reason that the Bills of Entry concerned did not show payment of Customs duty. It stands explained by the Appellants that initially the goods were imported without payment of duty availing the exemption for goods imported for supply to a project financed by World Bank and when the issue that they might not be eligible for such exemption for the period prior to 1.3.2000 was pointed out to them they paid the duty subsequently. In the facts of the case duty paid on raw materials should have been taken into account while the duty liability.

11. We are of the view that the impugned project is in fact a project financed by the World Bank. We do not see anything in the wordings of

the notification for denying the exemption to goods supplied to the project prior to the date from which finance was provided by the World Bank. As already decided in the case of **Nestor Pharmaceuticals Ltd.** exemption under Notification No. 108/95-CE cannot be denied for the reason that part of the project was met by the beneficiary of the loan from the World Bank. The fact that the expenditure up to a particular time frame was met by the beneficiary of the loan is not substantially different from the said position. We are of the view that the Appellants succeeds on merits also.

12. Now, there is an issue whether the Appellants are eligible for the refund of duty already paid. This is a matter to be decided in a separate proceedings in a refund application filed under Section 11B where issues like whether the claim is within the time limit prescribed and whether the incidence has been passed to the buyers will arise. Without examining these issues we do not want to pass any orders in the matter of refund claimed in the process of filing reply to demand for duty. It would appear that in this case the duty was borne by PGCIL who in turn passed it on to the owner of the system set up.

13. In view of the findings as above, we allow the Appeal to the extent of setting aside the impugned order demanding differential excise duty of Rs.1,13,28,687/- and interest thereon as well as penalty imposed under Rule 11AC of Central Excise Act read with Rule 25 of the Central Excise Rules 2002. We make it clear that we are not passing any order with regard to refund of duty already paid

(Pronounced in Court on..........................)

(Archana Wadhwa)
Member (Judicial)

(Mathew John)
Member (Technical)

RM

**PER: ARCHANA WADHWA**

14. I find myself in agreement with the order recorded by Learned Member (Technical) extending the benefit of Notification No.108/95-CE to the appellant. However, I have not been able to convince myself to be in agreement with the observations of learned Member (Technical), as recorded in para 12 of the order proposed. Accordingly, following para is being recorded separately.

15. On going through the impugned order of the Commissioner, I find that he has passed the following order, which for ready reference is reproduced below:-

*"In view of discussion as above, I pass the following order:*

*(i) The duty amount to Rs.2,34,48,545/- (Rupees Two Crores Thirty Four Lacs Forty Eight Thousand Five Hundred and Forty five only) is confirmed for recovery from the Noticee in terms of Section 11A(1) of the Central Excise Act, 1944. The duty amounting to Rs.1,21,19,858/- already paid by the Noticee is ordered to be appropriated against the total duty confirmed. Balance amount of Rs.1,13,28,687/- is required to be paid.*

*(ii) A penalty of Rs.10,00,000/- (Rupees Ten Lacs only) is imposed upon the Noticee under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.*

*(iii) The Noticee should also pay the interest on the duty confirmed in terms of Section11AB of the Central Excise Act, 1944.*

(iv) *As regards admissibility of modvat credit on the inputs imported and CVD paid subsequently, the Noticee is directed to approach to the Jurisdictional Divisional Commissioner, who will examine the admissibility of modvat credit as per law."*

16. It is seen from the above, the total duty confirmed against the appellant was to the tune of Rs.2,34,48,545/-. The order recorded by learned Member (Technical) is to the effect that the benefit of Notification No.108/95-CE, was available to the appellant and as such no duty demand could be confirmed against them by denying the benefit of said notification. Consequence of the order so recorded by the learned Member (Technical) would be that the demand confirmed against the appellant to the extent of Rs.2,34,48,545/- is not sustainable against them.

17. It is further seen that the appellant have already deposited an amount of Rs.1,21,19,858/-. The deposit of said duty was during the course of investigation against them. When the entire duty confirmed against the appellant stands set aside, duty deposited by them during the course of investigation becomes liable to be refunded to them in accordance with law. The provisions of Section 11B of Central Excise Act, 1944 deal with refund of such duty which becomes refundable as consequence of judgement, decree or order by the appellate authority. The same are also required to be examined from the unjust enrichment angle or from the other angle in terms of the provisions of section 11B. While implementing the Tribunal's order setting aside the total confirmed demand against the appellant, the lower authorities are bound to adhere to the provisions

of law while extending the consequential benefit to the appellant. Para 12 of the order recorded by the learned Member (Technical) on the issue whether appellant is eligible for refund of duty is beyond the scope of present proceedings, inasmuch as it is not the case where any refund of duty is claimed by the appellant and stands rejected by the lower adjudicating authority. The issue relates to denial of benefit of Notification No.108/95-CE and consequent confirmation of demand. Inasmuch as the proceedings before the lower authorities were not for claim of refund of any amount paid by the appellant, according to me, the observations made in para 12 of the order proposed by learned Member (Technical) are not necessary. As the issue is not of refund of any duty already paid, no order are required to be passed on the same and it should be left to the lower authorities to implement the present order of the Tribunal setting aside confirmation of the demand and imposition of penalty on the appellant in accordance with law. However, as learned brother has also held that no orders are being passed with regard to refund of duty, and my disagreement is only to the observations made by him, there exists no real difference of opinion requiring the matter to be placed before third member.

(Pronounced on 2/3/12)

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| **(MATHEW JOHN)**<br>**MEMBER(TECHNIAL)** | **(ARCHANA WADHWA)**<br>**MEMBER (JUDICIAL)** |

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